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Roger J. Miner '56

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Crime and Punishment in the Federal Courts

Lawyers are fond of saying that a criminal trial is a search for the truth. The manner in which the search is conducted, however, often leaves something to be desired. What is frequently missing in the process is the proper interrogation of witnesses, a skill recently seen to be entirely lacking in the membership of the Senate Judiciary Committee. We who serve as federal appeals court judges have occasion every day to review the transcripts of testimony given in the federal district courts in criminal cases. The testimony comes in the time-honored form of question and answer. It continues to amaze us how lawyers confound witnesses, trial judges and themselves as a result of inadequate preparation of witnesses and poor examination techniques. My colleagues and I characterize some of these lawyers as "walking violations of the sixth amendment." (That's the right to counsel one). To illustrate my point, I give some questions and answers taken from actual trial transcripts. It is hard to tell in many of these just who is more confused, the lawyer or the witness.

Q. What happened then?

A. He told me, he says, "I have to kill you because you can identify me."

Q. Did he kill you?

A. No.

Q. Now I am going to show you what has been marked as plaintiff's Exhibit No. 2 and ask if you recognize the picture.

A. John Fletcher.

Q. That's you?

A. Yes, sir.

Q. And you were present when the picture was taken, right?

Q. Now, Mrs. Johnson, how was your first marriage terminated?
A. By death.
Q. And by whose death was it terminated?
Q. What is your name?
A. Ernestine McDowell.
Q. And what is your marital status?
A. Fair.
Q. Are you married?
A. No, I am divorced.
Q. What did your husband do before you divorced him?
A. A lot of things that I didn't know about.
Q. At the time you first saw Dr. McCarthy, had you ever seen him prior to that time?
Q. Mr. Jefferson, is your appearance this morning pursuant to a subpoena which was served upon you?
A. No. This is how I dress when I go to work.
Q. And lastly, Gary, all your responses must be oral. Okay? What school do you go to?
A. Oral.
Q. How old are you?
A. Oral.
Q. Do you have any sort of medical disability?
A. Legally blind.
Q. Does that create substantial problems with your eyesight as far as seeing things?
Q. Are you qualified to give a urine sample?
A. Yes, I have been since early childhood.
Q. Was there some event, Valerie, that occurred which kind of finally made you determined that you had to separate from your husband?
A. Yes.
Q. What did he do?
A. Well, uh, he tried to kill me.
Q. All right. And then you felt that that was the last straw, is that correct?

EXPERT WITNESS

Q. What is the meaning of sperm being present?
A. It indicates intercourse.
Q. Male sperm?
A. That is the only kind I know.

VOIR DIRE

- Q. Can you participate in an endeavor in which the ultimate result might be death by lethal injection?
- A. They do that up in Huntsville, don't they? Yeah, I guess I could do it if it was on a weekend.
- Q. Can you tell us that you would follow the court's instructions regardless of what else happened during the course of the trial?
- A. Cognitively, yes. Rationally, yes. Emotionally, effectively, I don't know. Or perhaps effectively, yes, and rationally, no.

Having identified some problems in individual cases, I now turn to some problems pervading the entire federal criminal justice system. My subject is Crime and Punishment in the Federal Courts. My thesis simply is this: Too much crime is prosecuted in the federal courts, and too much punishment is imposed for federal crimes. When I say that too much crime is prosecuted in federal courts, I mean that Congress has applied the label of federal crime to an excessive number of acts and omissions said to constitute anti-social behavior. There are about 3,000 separate provisions scattered throughout the United States Code criminalizing various forms of conduct. Some of the acts or omissions proscribed could be better prosecuted in the state courts. Some need not be crimes at all.

Should it be a federal offense, for example, as it now is, to reproduce the image of "Woodsy Owl" and "Smokey the Bear"? To transport false teeth into a state without the permission of a local dentist? To transport water hyacinths in interstate

commerce? To issue a check for a sum less than \$1.00 not intended to circulate as currency? (I confess to a total inability to understand this offense) To impersonate a 4-H club member? To issue a false weather report on the representation that it is an official weather bureau forecast? To issue a false crop report? Until last year, when it was repealed because a number of us frequently made fun of it, a statute of Congress provided criminal penalties for detaining a carrier pigeon of the United States! Any discussion of statutory anachronisms would be incomplete without a mention of the Logan Act, which makes it a crime for a United States citizen to communicate with a foreign government with the intention of influencing that government relative to any disputes with the United States. The Logan Act was passed in 1799 and no one ever has been prosecuted for violating it. As far as I can tell, the only people who regularly brush up against the Logan Act are members of Congress on overseas tours.

In 1973 Henry Friendly, a judge of the nation's foremost appellate court, wrote a treatise on federal jurisdiction. Addressing the Mann Act, which then criminalized the interstate transportation of women for immoral purposes, Judge Friendly posed this question: "Why should the federal government care if a Manhattan businessman takes his mistress to sleep with him in Greenwich, Connecticut, although it would not if the love-nest were in Port Chester, NY?" The Mann Act since has been amended and now criminalizes the interstate transportation of any person

to engage in any sexual offense. Accordingly, it seems that it is a federal crime even today for that Manhattan businessman to take his mistress across state lines if, in doing so, he commits the offense of adultery in violation of state law. The question persists: "Why should the federal government care?"

Why indeed should the federal government be interested in a whole host of cases primarily involving violations of state law? Why should it be interested in embezzlement by a bank employee simply because the bank is insured by the Federal Deposit Insurance Corporation? Why should it be interested in theft from an organization solely for the reason that the organization receives a small stipend of federal funds? Why should it be interested in fraud just because the mails are somehow involved in carrying out the fraudulent scheme? Why should it be interested in state-defined gambling offenses for the sole reason that interstate travel is involved? Why should it be interested in extortion where the only added element is that commerce is somehow "affected?" And what possible interest can the federal government have in a local "loan shark," whose activities have absolutely no connection with interstate commerce?

If there is one area of criminal prosecution that best exemplifies the proposition that too much crime is prosecuted in federal courts, it is the area of drug offenses. Between 1980 and 1990, criminal drug filings in the federal district courts rose from 3,127 to 12,592, an increase of 303%. The primary factor contributing to the increase is the growth in the number

of prosecutions resulting from the additional number of assistant U.S. attorney positions authorized -- 471 in 1989; and 800 in 1990. Recent years also have seen increases in the numbers of agents employed by federal investigative agencies such as the FBI and the DEA to combat the war on drugs.

I do not say that the federal government should not play a part in this war. It has a most important part to play, and its agencies have proven very effective in interdicting the movement of drugs into the country as well as the movement of drugs between the states. Large-scale traffickers in drugs and their minions should be prosecuted in federal court. The Continuing Criminal Enterprise legislation has proved to be an important tool for prosecuting these people, as has the Racketeer Influenced and Corrupt Organizations Act, known as RICO. What I object to is the use of the federal courts for the prosecution of street corner sales and purchases of narcotic drugs. I object to the use of federal undercover agents being involved in small-quantity transactions, unless those transactions are part of are larger investigative operations. I am not alone in this. The Federal Courts Study Committee, an independent agency created by Congress to inquire into the issues and problems confronting the nation's federal courts and to develop a long-range plan for the future of the federal judiciary, recently reported as follows: "Federal drug enforcement strategy should target the relatively small number of cases that state authorities cannot or will not effectively prosecute." The Committee also reported that

"[o]ver-reliance on federal courts for drug prosecutions will either force Congress to bloat the federal courts beyond recognition or force the federal courts to stop meeting their other constitutional and statutory responsibilities." This is a theme to which I shall return when I sum up the reasons underlying my thesis that too much crime is prosecuted in the federal courts.

In order for Congress to define anti-social conduct as criminal, some constitutional authority must be identified as the source of the congressional power to legislate. In the case of the definition of drug offenses, it is the power to regulate interstate and foreign commerce. However, the prosecution of a narcotics offense in the federal courts does not require a showing that the drugs involved in the prosecution passed through interstate or foreign commerce. That is because Congress, in enacting the Drug Abuse Prevention and Control Act, dispensed with the individualized commerce clause connection by making the following finding in the statute: "Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic." Congress thus has determined that local sales of narcotics have an interstate character. Accordingly, marihuana grown, distributed and consumed in the same village can be prosecuted federally. Even for Congress, that is a great leap in logic.

A few years ago, the United States Attorney for the Southern

District of New York devised a program known as "Federal Day." On certain randomly selected days, those arrested in New York City for garden variety state law drug offenses by state law enforcement officers were prosecuted in federal court for federal counterpart offenses. Supposedly, this was a great deterrent to drug offenders, because on any given day they might fall into the clutches of the federal authorities and be prosecuted in federal court, where the penalties are said to be more draconian. I shall discuss the issue of federal penalties shortly. Not too long ago, I was constrained to hear the appeal of a case involving a \$30.00 drug transaction developed on Federal Day. In any event, no noticeable decrease in drug sales in New York City came about as a result of Federal Day, insofar as can be discerned. Notwithstanding that fact, Senator Joseph Biden last year proposed legislation establishing a National Federal Day. Fortunately, the bill did not pass.

There is no question that there is an urgent need to deal with the drug problem in the nation. The citizenry seems prepared to go along with almost anything to resolve the crisis. Constitutional rights frequently are in jeopardy at such times. Last week, I discussed with my class on Federal Crimes at New York Law School the provisions of the so-called Posse Comitatus Act, which prohibits the use of military forces to execute the laws. Some students thought it should be repealed. While one student said he would not like to have a regular army rifle company bivouacked in his neighborhood, another said: "You would

if you lived in my neighborhood." The problem is with us, but it cannot be solved by massive caseloads of drug prosecutions in federal courts. The solutions lie elsewhere.

Ninety-five percent of all criminal prosecutions in America occur at the state and local level. That is a simple fact. It means that if anything is to be done about crime, it must be done in those places. Consider the statistics. In the state of New York alone, nearly 80,000 felony cases were filed in 1990. More than 50,000 of those were in New York City. In the federal courts for the entire nation in 1990, just under 49,000 felony cases were filed. Although this is up from a figure of about 30,000 ten years ago, it obviously pales into insignificance next to the state figures. It is obvious from the statistics that the front lines of the war on crime are in the states, and the states must be assisted in fighting the war.

Rather than assisting the states, however, Congress continues to add federal crimes, overburdening what is, comparatively, a small court system. Six hundred and forty-nine judgeships now are authorized for the trial courts of the federal system and one hundred and seventy-nine for the courts of appeals. There is never a time when all these positions are filled. Yet, Congress added to the burden of these courts a few years ago by passing the Armed Career Criminal Act. This Act creates a new federal offense -- possession of a firearm by one who has three previous state convictions for a violent felony or serious drug offense. A 15-year minimum mandatory term is

provided. As if this federalization of state crime is not enough, there recently was introduced into Congress a bill to permit federal prosecution of murders committed with firearms that at some time had passed across state or national borders. This statute would apply to almost all of the 12,000 murders committed with firearms each year in the nation.

Where would we find the judges to hear these cases, and where would we find the prosecutors to prosecute them? In many districts throughout the country, judges are unable to get to their civil calendars because of the huge numbers of criminal cases that they must dispose of. The Speedy Trial Act requires that attention first be given to criminal cases. A judge in the Eastern District of New York, where the criminal caseload is very high, recently told me that he had been unable to try any civil case for over a year. The proliferation of criminal cases thus imposes a hardship upon those who seek civil relief in the federal courts for employment discrimination, civil rights violations, infringement of intellectual property rights, unfair business competition, personal injuries and a great variety of other cases brought to secure monetary or injunctive relief customarily heard in the federal courts.

There are only so many federal prosecutors, and they are very selective in the cases they prosecute. How could it be otherwise? They are constrained to decline cases presented to them by federal law enforcement agencies, and, as federal crimes proliferate, there are more declinations. When there are many

offenders but only a few are chosen to be prosecuted, the public perceives that the process is unfair. Moreover, in making the critical decisions about what types of anti-social conduct are worthy of attention, the prosecutor necessarily invades the domain of the legislator, and the separation of powers becomes blurred. There is another major consequence of the ongoing expansion of the Federal Criminal Code. I call it "the disappointment of promises unfulfilled." A more harsh description might be "the deception of the public." As Congress passes laws that purport to solve various problems through the federal criminal justice system, the public often assumes that the law is the solution. Obviously, it is not. The federal resources simply are not there. Congress can convert state crimes into federal crimes forever, but United States Courts and United States prosecutors will never be able to handle more than a tiny portion of the tens of thousands of crimes committed in the nation each year. Great expectations lead to great disappointments, an unfortunate consequence of too many federal crimes.

In spite of all the problems that courts and prosecutors have in allocating the limited resources available for criminal prosecutions in a federal court system so limited in size, some United States Attorneys just don't pay attention. Last year, an article in the Wall Street Journal described the activities of a United States Attorney named Stephen Markman, who was an Assistant Attorney General in the Reagan Justice Department. It

seems that Markman now is the United States Attorney in Detroit and has developed a program he calls "Project Gemini." The purpose of the Project is to prosecute supposedly dangerous criminals in federal court after they get light sentences in state court. Federal sentences often are much longer than state sentences for the same crime. People can be prosecuted for the same criminal activity in both systems because the dual sovereignty of the separate jurisdictions means that double jeopardy does not apply. The Wall Street Journal article gives as an example of Project Gemini the case of a man who received a sentence of one to five years in the state system for drug possession and an additional sentence of nine years in federal prison for the same offense. This is advanced as a good idea. The author of the article contacted me about Gemini and reported my response as follows: "[Judge Miner] says that these [criminal] cases are 'better, more efficiently and more frequently prosecuted by states.' Judge Miner also makes the excellent point that local voters should insist on better laws and tougher judges if that's the problem." He might have added that I consider the double prosecution concept unfair, a waste of resources, and a violation of the constitutional spirit of double jeopardy.

I for one think that the time has come to define clearly the national interests in the area of criminal jurisdiction. I think that large-scale interstate and international criminal activity should be the province of the national government, which also

should have in reserve the power to deal with crime where there has been a complete breakdown of local and state law enforcement. Some scholars believe that this power resides in the constitutional requirement that the United States guarantee to every state a republican form of government. Finally, I agree with the report of the Federal Courts Study Committee, or maybe it agrees with me because I have been saying it longer, that "[b]oth the principles of federalism and the long-term health of the federal judicial system require returning the federal courts to their proper, limited role in dealing with crime."

And now to punishment. According to recently-published statistics, there are 1 million people behind bars in the United States. At 426 per 100,000 of population, this nation leads the world in its rate of incarceration. South Africa is second, with 333 per 100,000 and the Soviet Union is third with 268. The figure for the United Kingdom, the source of our legal heritage, is 97. Japan has only 45 inmates per 100,000 of population. The total annual cost of incarceration in the United States is \$16 billion. While it is true that the United States crime rate is one of the highest in the world, it is also true that the nation's prison population has doubled since 1980 although the crime rate has fallen 3.5% during that period.

According to its most recent annual report, the Federal Bureau of Prisons had under its jurisdiction at the end of 1990 an inmate population of approximately 59,000. This was an increase of nearly 11% over its population at the end of 1989.

Federal prisons now are at 160% of capacity. The average annual cost of confinement per federal inmate is calculated at about \$18,000. Prison overcrowding creates a plethora of problems, not the least of which is financial. Congress as well as state legislatures are reluctant to spend the millions necessary to relieve the overcrowding problem. The ordinary difficulties that confront prison administrators are compounded by overcrowding. Medical services, work schedules, recreational facilities, food supplies, and fire evacuation plans all are impacted by prison population growth. News reports of assaults, riots and hostage-taking by prisoners are all too frequent. With two-thirds of the nation's inmates housed in units providing them with less than 60 square feet of floor space, it is no wonder that correction officials refer to the present situation as a crisis.

I quote from the Bureau of Prisons Report that I referred to earlier:

This growth rate also reflects changes in public attitudes and in Federal sentencing laws, which have reduced good time allowances, eliminated parole, and required mandatory minimum sentences for many drug offenses. Time served is increasing dramatically in many offense categories; for instance, the average sentence for robbery was 44.8 months prior to statutory changes, but has increased to 78 months under the new law, while the number receiving probation for the same offense has dropped from 18 to 0.5 percent following changes in sentencing structure. The impact of these changes in the Nation's criminal justice system is significant. At the end of 1990, the Bureau held roughly 8,000 inmates more than had been projected earlier in the decade, before the new sentencing laws were passed.

The new sentencing laws to which the Report refers are those passed as part of the Sentencing Reform Act of 1984, which has been referred to as the most broad-reaching reform of criminal sentencing in this century. The Act called for the establishment of the United States Sentencing Commission to promulgate mandatory sentencing guidelines and came in response to a perceived disparity in sentences imposed for the same crimes by federal judges throughout the nation. In 1985, President Reagan appointed, and the United States Senate confirmed, seven persons to serve on the Commission. The sentencing guidelines established by the Commission first became effective in November of 1987. In 1989 a challenge to the constitutionality of the guidelines was rejected by the Supreme Court. The challenge was based upon separation of powers concerns, since the Commission was placed in the Judicial Branch and its members, including the federal judge members, were appointed by the President. Historically, of course, Congress would establish a criminal penalty and delegate almost unfettered discretion to the judges to impose penalties within a broad range. The Supreme Court held: "The Constitution's structural protections do not prohibit Congress from delegating to an expert body located within the Judicial Branch the intricate task of formulating sentencing guidelines consistent with such significant statutory direction as is present here."

Before the guidelines were established, the federal government employed a system of indeterminate sentencing

supplemented by the use of parole after release from confinement. Under the indeterminate model, Congress established a maximum sentence and the court could impose anything from a suspended sentence and probation up to the maximum. If the court imposed a sentence of imprisonment, the Parole Board could release the defendant before the expiration of the sentence imposed, upon a consideration of various factors. The Executive Branch, through the Parole Board, thus had a good deal to say about the actual duration of imprisonment.

The Sentencing Reform Act of 1984 made all sentences basically determinate, providing for release at the completion of the sentence imposed subject only to a limited reduction for good behavior. Strangely enough, the Act specifically instructed the Commission to "insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." That leaves only the general purposes of deterrence, incapacitation and retribution. It is amazing but true; we have given up all hope of rehabilitation in the federal sentencing process, and that seems to me to be a serious matter. We should never give up hope, especially in view of the fact that just about every person now serving a prison sentence will one day return to society. It is in the best interest of all of us to try to correct, reform and rehabilitate.

Here is another amazing fact about the new world of sentencing: Congress required that the Commission make sure that its guidelines, "in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant." Disregard family responsibilities? Disregard family ties? Disregard employment record? These are the very elements that enable judges to tailor individual sentences. It is people we are sentencing, and each person is different, and each person should not be sentenced the same way for the same crime. Any federal judge will tell you how it used to be in sentencing -- staying awake at night, unable to sleep because of the fierce responsibility of making the punishment fit the individual as well as the crime. This, alas, no longer is the case. Sentencing now is done by the numbers, and a new federal trial judge recently told me that it suited him very well indeed. He said that he was content to sentence by the guidelines because it took a lot of worry off his mind. My response was that if you want to take worry off your mind, you should not be a federal judge.

The sentencing guidelines work like this: There is a table of 43 rows and 6 columns. Each row represents an offense level and each column represents a criminal history category. The guidelines assign a number corresponding to one of the numbered rows for each offense, and the offense levels are adjusted upward

and downward to reflect specific aggravating and mitigating circumstances, which also are assigned numbers to be added or subtracted. The appropriate criminal history category is selected by assigning prescribed numbers of points to the defendant's prior convictions and selecting the appropriate criminal history category on the basis of the total points. Where each of the 43 offense levels and each of the 6 criminal history categories intersect, the sentencing table prescribes a limited sentencing range in which the top of the range generally does not exceed the bottom of the range by more than 25%. It is this intersection that gives the sentence to be imposed unless very special circumstances allow an upward or downward departure.

One would think that the Commission would undertake a detailed study in an effort to decide what numbers to assign for basic offense levels. What it in fact did was to use average sentences imposed before the Sentencing Reform Act was adopted. Indeed, the assigned levels seem most often to be on the high side, perhaps as a result of the congressional admonition that the Commission "insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense." While it is true that I spend most of my life trying to figure out what Congress intended to do, I cannot reconcile that instruction with this one: "The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the

Commission." To top it all off, Congress continues to prescribe statutory minimum sentences for certain selected crimes, especially in the drug area. This congressional activity has caused great consternation among the members of the Commission, who recently issued a report saying to Congress: "But I thought that is what you wanted us to do!"

Taking its cue from the mandate contained in the statute that established it, the Sentencing Commission reviewed a number of personal characteristics of offenders and specifically pronounced them "not ordinarily relevant" in determining whether a sentence outside the guidelines should be imposed. Those characteristics are: Age; education and vocational skills; mental and emotional conditions; physical condition, including drug dependence and alcohol abuse; previous employment record; family ties and responsibilities and community ties. I just cannot see how any sentencing process worthy of the name can be put in place that disallows consideration of these individual characteristics. I cannot see why we have abandoned the rehabilitative model. I cannot see why imprisonment kicks in so close to the beginning of the sentencing scale in the grid. I cannot see why the Sentencing Commission has not given greater consideration to intermediate punishments, such as work release, community service programs, educational and vocational training, home confinement and various forms of supervised activity that will give the taxpayer a break. I cannot see why criminals should not be forced to work to earn money to make restitution to

those they have harmed. I do not see why the human factor in sentencing should be replaced by a chart and indeed by computer software. I kid you not. The Sentencing Commission now has available to those who wish to use it computer software to allow the computation of sentences on your user-friendly computer terminal. I remember reading as a young man a futuristic novel where information was placed in one end of a machine and a sentence came out the other. Perhaps that future now is here. I certainly hope not.

The Federal Courts Study Committee recommends the repeal of mandatory minimum sentencing. The Committee also recommends that serious consideration be given to "proposals that (1) the guidelines issued pursuant to the Sentencing Reform Act not be treated as compulsory rules but, rather, as general standards that identify the presumptive sentence, and (2) the guidelines, and if necessary the Sentencing Reform Act, be amended to permit consideration of an offender's age and personal history." I think that that is the least we can do. I am for returning the human face to sentencing. We will all benefit from it.

I close with a story I have been telling for many years. It seems that when the foreperson of a jury was called upon to give a verdict of guilt or innocence in a criminal case, the response was as follows: "Your Honor, we have decided that we don't want to get involved." When it comes to criminal justice, ladies and gentlemen, I suggest that none of us has the option to be uninvolved.

Thank you.